

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL DEMETRIUS DAVIS,

Defendant-Appellant.

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UNPUBLISHED

January 17, 2003

No. 231512

Saginaw Circuit Court

LC No. 00-018554-FC

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to fifty to seventy-five years' imprisonment for the second-degree murder conviction, two to ten years' imprisonment for the felon in possession of a firearm conviction, and a consecutive two year prison term for the felony-firearm conviction. We affirm.

Defendant first claims that under *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998), his second-degree murder conviction was the result of jury compromise because there was insufficient evidence of premeditation and deliberation to support the trial court's first-degree murder instruction. We disagree on two accounts. First, because defendant failed to move for a directed verdict with respect to this charge, this issue is not preserved for appellate review. *People v Lugo*, 214 Mich App 699, 710-711; 542 NW2d 921 (1995); see also MCR 6.419. Indeed, defendant not only forfeited this issue, he waived it when he expressly waived objection to the jury instructions at trial. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Second, even if the issue had been preserved, we would conclude that the prosecution presented ample evidence to establish a question for the jurors as to whether defendant committed first-degree murder. A first-degree murder conviction requires the prosecution to prove beyond a reasonable doubt that the defendant intentionally killed the victim and that the killing was premeditated and deliberate, rather than a split-second, impulsive decision. MCL 750.316; *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984); *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). Premeditation requires sufficient time for the defendant to take "a second look." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). A sufficient time lapse to provide an opportunity for a second look may be seconds or

minutes, depending on the circumstances surrounding the killing. *People v Meier*, 47 Mich App 179, 191-192; 209 NW2d 311 (1973). Further, premeditation and deliberation may be inferred from all the facts and circumstances surrounding the killing, including the defendant's actions before and after the crime, any previous relationship between the victim and the defendant, and the weapon used and the location of the wounds inflicted. *People v Coy*, 243 Mich App 283, 315-316; 620 NW2d 888 (2000); *Plummer, supra*.

In this case, premeditation and deliberation may be inferred from defendant's actions before and after the killing, the previous relationship between defendant and Jack Tillman, and the circumstances of the killing itself. See *id.* There was evidence presented that prior to the shooting, defendant and Tillman had gotten into an argument over splitting drug sales and that Tillman had made threats against defendant with a gun. However, defendant refused to share his drug business with Tillman. Tillman testified that one or two nights before the shooting, defendant threatened him, telling Tillman that he and his "crew" were "snitches" and "snitches" were not allowed near him and that if Tillman came around "something was going to go down." Further, Robert Moore gave defendant an unloaded gun sometime prior to the shooting.

On the day of the shooting, defendant was standing in Anthony Williams' yard. At some point Tillman pulled up in a car in front of Williams' yard, with the victim and one other person in the car. The evidence established that defendant pulled a gun from either his waistband or intentionally took one from Moore, and started shooting as soon as Tillman and Coleman opened their car doors. However, before defendant started shooting, he said, "I told you motherf-----, don't come over here." Thereafter, defendant fired several shots<sup>1</sup> at Tillman's car and ran away.<sup>2</sup> The fact that defendant missed his target and killed Coleman with a stray bullet that ricocheted off concrete is immaterial. Defendant's animosity and threats toward Tillman together with his statements prior to shooting seven times at Tillman presented a question of fact whether there was sufficient time for defendant to form the requisite intent to kill after premeditation and deliberation rather than a split-second impulsive decision.

Notwithstanding the jury's failure to find defendant guilty of first-degree murder, the question of proof of the disputed elements of intent, premeditation, and deliberation were properly left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Accordingly, there was sufficient evidence to warrant submission to the jury of the first-degree murder charge.

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<sup>1</sup> The evidence indicated that defendant may have fired as many as seven shots at Tillman as seven fired cartridge cases were found at the scene.

<sup>2</sup> There was also evidence that defendant threatened witnesses after the shooting. Moore saw defendant after the shooting, before defendant turned himself into the police. Defendant threatened to kill anyone who told authorities that he was responsible for shooting the victim, Eric Coleman.

Defendant also argues that he was denied the effective assistance of counsel. We disagree. Because there was no *Ginther*<sup>3</sup> hearing, our review of this issue is limited to errors apparent on the existing record. *Avant, supra* at 507.

In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

Defendant first claims that his trial counsel was ineffective in failing to impeach key witnesses with prior statements that supported his case for self-defense. Specifically, defendant asserts that his trial counsel failed to impeach Moore with prior inconsistent statements that he gave to police regarding threats Tillman made to defendant and the gun Moore had given to defendant. A review of the record reveals that trial counsel effectively impeached Moore with his prior inconsistent statements. Contrary to defendant's arguments, trial counsel did challenge Moore's trial testimony on several occasions and emphasized various inconsistencies between Moore's trial testimony, preliminary examination testimony, and statement to police, including the inconsistency that Moore told police that he gave defendant a loaded gun. Thus, trial counsel's performance was not unreasonable in this respect. Regardless, we find that trial counsel's failure to pursue any further attempts at impeaching Moore with prior inconsistent statements did not prejudice defendant or affect the outcome of the proceedings. *Noble, supra*. Accordingly, defendant was not denied the effective assistance of counsel on this basis. Additionally, defendant's argument that his trial counsel was ineffective in failing to impeach Moore with the police's threat of prosecution for aiding and abetting or as an accessory to murder if Moore did not cooperate is without merit as the record reveals that the police made no such threat.

Defendant further claims that his trial counsel was ineffective in failing to investigate and present as evidence a conversation that took place in the bathroom regarding the gun that was seen and the threat that was made by Tillman towards defendant. Trial counsel's failure to present evidence of the bathroom conversation did not result in ineffective assistance of counsel because defendant was not prejudiced by the alleged error where such evidence would have been cumulative to evidence already presented to support defendant's theory of self-defense. See *Noble, supra*; *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994) (failure to call

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense).

Next, defendant argues that resentencing is required because his guidelines were erroneously scored. However, because defendant failed to either raise the purported scoring errors “at or before sentencing” or persuasively argue that “the challenge was brought as soon as the inaccuracy could reasonably have been discovered,” this issue is not properly preserved for our review. As such, defendant is foreclosed from raising a challenge to the scoring of his guidelines. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002).

Defendant next argues that he is entitled to a new trial because the prosecution committed misconduct when it personally vouched for a witness. “We review claims of prosecutorial conduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, defendant has failed to provide any citations to the record in support of his argument. Defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Id.* at 587; MCR 7.212(C)(7). Defendant’s failure constitutes an abandonment of this issue. *Watson*, *supra*.

Defendant also contends that the trial court abused its discretion in failing to answer the jury’s questions during deliberations. We disagree. Because defendant failed to object to the trial court’s decision regarding how to handle the jury’s questions, this issue is reviewed for plain error affecting defendant’s substantial rights, which generally requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant has failed to show that he was prejudiced by the trial court’s failure to answer their questions. In response to the jurors’ three questions regarding factual issues in the case, the trial court properly instructed the jury to rely on their collective memory. The record does not otherwise support defendant’s speculative argument that he was denied a fair trial by the trial court’s handling of the remainder of the jury’s requests. In fact, the trial court’s instructions to the jury indicate that the instructions would be transcribed for them and any or all exhibits would be made available upon request. Thus, reversal is not warranted.

Defendant last argues that the trial court erred in failing to instruct the jury on the lesser included offense of “manslaughter” when the evidence supported such an instruction. The first condition for a lesser included offense instruction is a proper request. *People v Beach*, 429 Mich 450, 482-483; 418 NW2d 861 (1988) (citations omitted). Moreover, defendant must adequately apprise the trial court of exactly what lesser included offenses are being requested. *Id.* In this case, defendant failed to request any manslaughter instructions in the trial court. Indeed, not only did defendant fail to request an instruction on voluntary or involuntary manslaughter, he expressly acquiesced to the jury instructions as given. A defendant may not waive objection to an issue before the trial court and then raise it as an issue on appeal for his waiver has extinguished any error. *Carter*, *supra*.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald